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Supreme Court of the United States.

OCTOBER TERM, 1970

No. 602

ARNOLD TOURS, INC., ET AL.,
Petitioners,
v.
WILLIAM B. CAMP ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

TIMOTHY J. MURPHY,
RICHARD W. MURPHY,
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ADDISON C. GUTCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Time Magazine, Business Section, p. 101, November 8, 1968 9n.

Supreme Court of the United States.

October Term, 1969.

No.

ARNOLD TOURS, INC., ET AL.,
Petitioners,
v.
WILLIAM B. CAMP ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case on June 1, 1970.

An earlier petition for a writ of certiorari was presented to this Honorable Court and on March 23, 1970, in Case No. 128, said petition was granted by this Honorable Court and the judgment of the United States Court of Appeals for the First Circuit was vacated (Appendix F). The case was remanded for further consideration in light of *Association of Data Processing Service Organizations, Inc.* v.

Camp, 397 U.S. 150, and *Barlow* v. *Collins,* 397 U.S. 159. Upon reconsideration, the First Circuit upheld their earlier judgment (Appendices A and E).

Opinions Below.

The first opinion of the Court of Appeals for the First Circuit is reprinted in Appendix D appended hereto. The second opinion of the Court of Appeals for the First Circuit, upon which this Petition is based, is reprinted in Appendix E appended hereto. The opinion of the District Court is reported in 286 F. Supp. 770 (1968) and is reprinted in the record herein commencing at R. 44.*

Jurisdiction.

The opinion of the Court of Appeals was filed on June 1, 1970, and judgment was entered on June 1, 1970 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Question Presented.

Whether the petitioners have legal standing to challenge (a) the decision of the Comptroller of the United States Currency in allowing national banks to enter the travel agency business; and (b) the actual entry of the South Shore National Bank into the travel business.

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* "R" hereinafter refers to the Appendix to Brief for Plaintiffs, Appellants, filed in the First Circuit Court of Appeals.

Statute Involved.

The relevant provisions of the National Bank Act, as amended (12 U.S.C. Sec. 24(7)), are printed as Appendix B to this Petition.

The Comptroller's ruling contained in Comptroller's Manual for National Banks, Paragraph No. 7475, is printed as Appendix C to this Petition.

Statement of the Case.

The petitioners are forty-two independent travel agents of Massachusetts engaged in the travel agency business. Many of the activities and obligations of the travel agents are controlled by conferences of air and steamship carriers which are in certain instances supervised by the Civil Aeronautics Board and the Federal Maritime Commission (R. 2 and Exhibit A).

The petitioners brought this suit individually and also as a class on behalf of all other Massachusetts firms in the travel business (R. 2-3).

The respondent William B. Camp is the Comptroller of the Currency, who is charged by law with administrative and regulatory authority with respect to national banks. Rule 67, issued by the Comptroller in 1949, stated: "It is the position of this office that a national bank does not have the legal right to act as agent . . . of transportation companies in the operation of a regular travel agency . . ." However, Mr. Camp's predecessor, Comptroller James J. Saxon, a former lobbyist and attorney for the national banks, in 1963 arbitrarily ruled, without notice and without a hearing, that national banks may enter into the travel business on a full-scale basis for profit (R. 14). This decision represented an abrupt change in policy on the part of the Comptroller (R. 4).

In November, 1966, respondent South Shore National Bank availed itself of the Comptroller's ruling and entered into the travel agency business. Said Bank, with approximately twenty-seven branches, is the first and only bank in Massachusetts to engage in the travel agency business (R. 5). It has entered into the travel business on a large-scale basis and has launched a massive advertising program, complete with seven roadway billboards, full-page newspaper ads and a radio saturation program (R. 5 and Exhibit B).

There are approximately ninety other national banks in Massachusetts with approximately three hundred forty-five branches (R. 6).

The petitioners contend that the Comptroller exceeded his authority in allowing the national banks to enter into the travel business and that the South Shore National Bank is illegally competing with them for travel customers. The petitioners have lost substantial business and profits and stand to lose even greater business and profits in the future as a result of the South Shore National Bank's illegal entry into the travel business (R. 3, 5, 6, 7, 24, 27).

As a result thereof, on May 8, 1967, the petitioners brought suit for a declaratory judgment and mandatory injunction (R. 2-8).

On July 11, 1968, motions for summary judgment brought by the respondents were allowed by the District Court and a similar motion brought by the petitioners was denied (R. 44, 48-49). The court held that the petitioners had no standing to sue.

From such order of the District Court, the petitioners appealed to the United States Court of Appeals for the First Circuit (R. 49). That court affirmed the judgment of the District Court in a written opinion (Appendix D herein).

From the Court of Appeals' decision, the petitioners brought a petition for a writ of certiorari to this Honorable

Court which was granted, and the judgment of the United States Court of Appeals for the First Circuit was vacated. (Appendix F). The case was remanded to the First Circuit Court of Appeals for further consideration in light of *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, and *Barlow* v. *Collins*, 397 U.S. 159.

After reconsideration, the United States Court of Appeals for the First Circuit reaffirmed its earlier judgment and, accordingly, upheld the judgment of the District Court in a written opinion (Appendix E herein).

Reasons for Granting the Writ.

The decision below is in direct conflict with other federal courts on the identical question and is also in direct conflict with this Court's recent decisions. Moreover, the question involved is important and recurring.

1. The issue as to whether small, independent businesses such as travel agents, insurance brokers, or the like have standing to challenge the rapidly spreading invasion by national banks into non-banking fields of competition continues to remain unresolved in various circuits, notwithstanding this Honorable Court's attempt to clarify the issue of standing in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (hereinafter referred to as "Adapsco") and *Barlow* v. *Collins*, 397 U.S. 159 (hereinafter referred to as "Barlow").

When this Court previously granted certiorari and vacated judgment in this case and then remanded it for reconsideration, it seemed obvious by this Honorable Court's action and from this Honorable Court's language in *Adapsco* and *Barlow* that the petitioning travel agents had "standing to sue" inasmuch as they arguably came within

the zone of interests sought to be protected by the National Bank Act and the Bank Service Corporation Act. However, the Court of Appeals for the First Circuit refused to change its earlier decision and, in effect, dissected the *Adapsco* and *Barlow* decisions to the point where they seemingly found an excuse to reaffirm their earlier decision. They refused to acknowledge the "trend . . . toward the enlargement of the class of people who may protest administrative action."[1] And, as a practical matter, the Association of Travel Agents is the only likely group which would challenge this competition. Refusal to allow review here commits this action wholly to agency discretion.[2]

As a result of this unwillingness to admit error, we still have the anomalous situation where data processing companies, which are more related to the business of banking, do have standing to challenge competition presented by the national banks, but travel agent companies, which are totally unrelated to the business of banking, do not have standing to sue. Further, the First Circuit's opinion is in direct conflict with numerous other Federal Court decisions.[3]

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[1] *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 154.

[2] *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 175, n.9 (dissenting and concurring opinion of Brennan, J.).

[3] Compare *Saxon* v. *Georgia Association of Independent Insurance Agents*, 399 F. 2d 1010 (5th Cir. 1968); *Baker, Watts & Co.* v. *Saxon*, 261 F. Supp. 247 (D. D.C. 1966), aff'd sub nom. *Port of New York Authority* v. *Baker, Watts & Co.*, 392 F. 2d 497 (D.C. Cir. 1968); *Natl. Assn. of Securities Dealers, Inc.* v. *Securities & Exchange Commission*, 420 F. 2d 83 (D.C. Cir. 1969); *Air Reduction Co. Inc.* v. *Hickel*, (D.C. Cir. 9/22/69. F. 2d ; *National Welfare Rights Organization* v. *Finch*, (D.C. Cir. 6/9/70), F. 2d ; with *Arnold Tours, Inc.* v. *Camp* (1st Cir. 6/1/70), F. 2d .

The very "compounded confusion" which Mr. Justice Brennan and Mr. Justice White foresaw in their concurring and dissenting opinions in *Adapsco* and *Barlow* has quickly become a reality by reason of the First Circuit's decision in this case.

2. The First Circuit clearly committed an error in the instant case in interpreting this Court's decisions in *Adapsco* and *Barlow*. The First Circuit found that injury was alleged in fact and that reviewability of the agency decision was available (Appendix E, p. 32, n. 1). However, they stated that the travel agents have not produced a "scintilla of evidence tending to show that Congress was specifically concerned with the competitive interests of travel agencies; nor have they shown enough evidence of concern for general business competitors to create a 'zone' within which they are arguably included" (Appendix E, p. 33).

It seems glaringly inconsistent that the First Circuit could find "reviewability," which means that travel agents "are within that class of 'aggrieved' persons who, under Section 702 are entitled to judicial review of 'agency action,' " and yet still find that they are not arguably within a protected zone of interest.

The First Circuit's reasoning still tends to go to the merits and is directly contrary to this Honorable Court's language in *Adapsco* when it said:

> "We do think, however, that § 4 arguably brings a competitor within the zone of interests protected by it. [P. 156.]
>
> "We find no evidence that Congress in either the Bank Service Corporation Act or the National Bank Act sought to preclude judicial review of administrative rulings by the Comptroller as to the legitimate

scope of activities available to national banks under those statutes. Both Acts are clearly 'relevant' statutes within the meaning of § 702. The Acts do not in terms protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Act are easily identifiable. It is clear that petitioners, as competitors of national banks which are engaging in data processing services, are within that class of 'aggrieved' persons who, under § 702, are entitled to judicial review of 'agency action.'

"Whether anything in the Bank Service Corporation Act or the National Bank Act gives petitioners a 'legal interest' that protects them against violations of those Acts, and whether the actions of respondents did in fact violate either of those Acts, are questions which go to the merits and remain to be decided below." (Pp. 157-158.)

It is clear that the travel agents' interests are directly affected by a broad or narrow interpretation of the Act, and it appears that this Court ruled that both the National Bank Act and the Bank Service Corporation Act have apparent general policies which might not "in terms protect a specified group," but are at least arguably designed in general to protect certain groups. The general policies attributed to the Acts by the Supreme Court should necessarily constitute the "scintilla of evidence" for which the First Circuit is looking.

In addition, Section 4 of the Bank Service Corporation Act forbids bank service corporations from engaging "in *any* activity other than the performance of bank services for banks"[4] (emphasis supplied) which, in terms, explicitly

[4] Bank Service Corporation Act of 1962, 12 U.S.C. § 1864.

forbids them from entering the travel business, and thus there is certainly arguable proof that Congress intended to protect not only data processing companies but all other non-banking companies from competition. This explicit prohibition should at least arguably bring the travel agents within the zone of interests sought to be protected by the Acts.

It is also interesting to note that in 1967 the Massachusetts Legislature enacted a law prohibiting banks from operating a travel agency.[5]

3. The implications of the issue on which the First Circuit and other federal jurisdictions have diverged are important.

With the recent phenomenon of one-bank holding companies and with the growing invasion of conglomerate industries, it is apparent that illegal competition by national banks should be stopped. The Chairman of the Federal Reserve Board, William McChesney Martin, said in opposition to the Comptroller that the entry by the banks into unrelated business ". . . can affect the whole capitalistic system in the United States. The line between banking and commerce should not be erased."[6] The travel agents attempted to prevent the line from being erased but have been denied even the opportunity to raise the issue. This recent trend by national banks to invade business areas totally unrelated to the business of banking poses an important question of federal law, namely, what are the limits of power that Congress has given national banks.

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[5] Massachusetts General Laws, chapter 167, section 12, which states in pertinent part: "No bank shall engage in the business of operating a travel agency." (As added by St. 1967, c. 220.)

[6] Time Magazine, Business Section, p. 101, November 8, 1968.

To affirm the First Circuit's decision would be to permit the national banks to compete illegally in any businesses they wanted to where there were no express laws protecting the damaged businesses. For example, national banks could go into the night club, laundry, liquor or construction business, &c., without fear of reprisal. National banks have already entered into numerous non-banking fields.[7]

To allow the First Circuit's decision to stand would be to emasculate the general intent of the *Adapsco* and *Barlow* decisions and would allow national banks to run roughshod over small independent businesses so long as there was legislative silence with reference to the particular business in question. In getting bogged down in the refinements of the standing issue, the court has allowed itself to get further and further away from the realities of this age and opens itself to persuasive attack by those who say that the law has no relevance and that the little man is prevented by the government from getting his day in court.

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[7] See House of Representatives Report, No. 91-387, Bank Holding Companies, page 20, which states:

> "Some of the activities carried on by these 82 nonbank subsidiaries including insurance agencies; real estate investment companies; life and health insurance companies; radio and television broadcasting; experimental and demonstration farms; management consultants and research; underwriting of casualty insurance; ranching; department store operations; travel agencies; carpet manufacturer; furniture manufacturer; restaurant operator; textile manufacturer; manufacturer of heating equipment; lawn mower manufacturer; shoe manufacturer; installers of communication equipment; pizza parlor leasing; stock savings and loan association owner; building contractor; steel erection and sales; courier operator; finance company operator; heavy equipment leasing firm; cold storage warehouse; mortgage finance and servicing; office and home construction firm; cable television company; investment management company; and manufacturer of transistors and integrated circuits."

The petitioners here, who are being economically injured and who have a concrete interest in this matter, are in a position where an agency rather than a court has the power to interpret a statutory term with finality. Judicial review of final agency action is being *cut off* even though, as the First Circuit admitted, reviewability is not a problem and there is no evidence of a congressional intent to prohibit judicial review.

Conclusion.

As Mr. Justice Douglas said in *Flast* v. *Cohen*, 392 U.S. 83, 111:

> "The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. . . . [W]here wrongs to individuals are done . . . it is abdication for courts to close their doors."

It is respectfully requested, for the reasons above stated, that this petition for writ of certiorari be granted so that this particular abdication, which has serious national ramifications, may be corrected.

Respectfully submitted,

TIMOTHY J. MURPHY,

RICHARD W. MURPHY.

Appendix "A."

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7192.

ARNOLD TOURS, INC., ET AL.,
PLAINTIFFS, APPELLANTS,
v.
WILLIAM B. CAMP ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT.

Entered JUNE 1, 1970.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts on remand from the Supreme Court of the United States, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The order of the District Court dismissing the complaint for lack of standing is affirmed.

By the Court:
/s/ DANA H. GALLUP
Clerk.

Appendix "B."

Statute Involved.

Title 12, United States Code, § 24, paragraph Seventh, in pertinent part, states:

> "Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> . . . . . .
>
> "Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this chapter."

Appendix "C."

Comptroller's Manual for National Banks

No. 7475. National banks acting as travel agents

Incident to those powers vested in them under 12 U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles as agent for a local rental service. In connection therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank.

Appendix "D."

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7192.

ARNOLD TOURS, INC., ET AL.,
PLAINTIFFS, APPELLANTS,
v.
WILLIAM B. CAMP ET AL.,
DEFENDANTS, APPELLEES.
APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

---

and

No. 7186.

THE WINGATE CORPORATION,
PLAINTIFF, APPELLANT,
v.
INDUSTRIAL NATIONAL BANK ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before ALDRICH, *Chief Judge*,
WOODBURY,* *Senior Circuit Judge*, and
COFFIN, *Circuit Judge*.

No. 7192.

Richard J. Murphy, with whom *Timothy J. Murphy* was on brief, for appellants.

Alan S. Rosenthal, Attorney, Department of Justice, with whom *Edwin L. Weisl, Jr.*, Assistant Attorney General, *Paul F. Markham*, United States Attorney, and *Leonard Schaitman*, Attorney, Department of Justice, were on brief, for William B. Camp, Comptroller of the Currency, appellee.

Elliott V. Grabill, with whom *Arthur H. Bloomberg* and *Grabill, Ley & Butterworth* were on brief, for South Shore National Bank, appellee.

No. 7186.

Edward J. Regan, with whom *Eustace T. Plaikas* and *Graham, Reid, Ewing & Stapleton* were on brief, for appellant.

Matthew W. Goring, with whom *Edward M. Watson, Robert W. Meserve, John B. Newhall, Gordon L. Doerfer, Hinckley, Allen, Salisbury & Parsons* and *Nutter, McClennen & Fish* were on brief, for Industrial National Bank of Rhode Island, appellee.

Alan S. Rosenthal, Attorney, Department of Justice, with whom *Edwin L. Weisl, Jr.*, Assistant Attorney General, *Edward P. Gallogly*, United States Attorney, and *Stephen R. Felson*, Attorney, Department of Justice, were on brief, for William B. Camp, Comptroller of the Currency, appellee.

Robert J. McOsker, City Solicitor, and *Vincent J. Piccirilli*, Assistant City Solicitor, on brief for City of Providence, appellee.

Matthew Hale on brief for The American Bankers Association, amicus curiae.

March 27, 1969.

ALDRICH, *Chief Judge*. These are two actions by parties engaged in certain business pursuits to restrain competition from national banks which, supported by rulings of the Comptroller of the Currency, have entered their fields. Plaintiffs seek, basically, to attack these rulings. In both

* Sitting by designation.

cases the district courts held that they were without standing to do so, and dismissed the complaints on motions of the defendants. Plaintiffs appeal.

THE TRAVEL AGENCY BUSINESS

We consider first the action brought by Arnold Tours, Inc. and some forty other independent travel agencies in Massachusetts, allegedly on behalf of others similarly situated as well as themselves, against the Comptroller and the South Shore National Bank. The bank, in reliance upon a ruling by defendant Comptroller's predecessor,[1] is engaging not merely in the financial aspects of travel, but "full" travel service, or a complete travel agency business. To quote from what is said to be the bank's own announcement, its employees are prepared to arrange for bicycles in Bermuda, villas on the Riviera, and houseboats in Kashmir. The Comptroller argues at length that this is traditional and legitimate bank activity. We do not, however, consider this matter except to say that plaintiffs present enough of an issue so that the question of standing is properly before us. We also note that no question of reviewability of the Comptroller's rulings has been raised. *See generally,* Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367, 383 & n. 60 (1968). Our sole question is the correctness of defendants' contention, which we will para-

[1] "¶7475. National banks acting as travel agents.

Incident to those powers vested in them under 12 U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles as agent for a local rental service. In connection, therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank. See ¶7376."

phrase as saying that what the bank chooses to do is, both literally and figuratively, none of plaintiffs' business.

It has long been settled that an ordinary competitor has no standing to complain of a party's lack of legal authority to engage in his business, in a suit against the competitor, the government, or both. *Railroad Co.* v. *Ellerman*, 1881, 105 U.S. 166; *Alabama Power Co.* v. *Ickes*, 1938, 302 U.S. 464; *Tennessee Power Co.* v. *TVA*, 1939, 306 U.S. 118. Despite numerous exceptions, this principle has withstood erosion not only because of the traditional rationale behind standing doctrines generally, *see Flast* v. *Cohen*, 1968, 392 U.S. 83, 91-101, but because of the policy encouraging free and open competition—a policy that favors competition in the market place, not in the courts. The exceptions, where standing is recognized, are as well established as the principle itself. The first is for complaints of "illegal" competition, by which is usually meant competition that is unlawful as to plaintiff apart from considerations of corporate power or authority. *See Alabama Power Co.* v. *Ickes, supra* at 479; *Central Louisiana Elec. Co.* v. *REA*, W.D.La., 1964, 236 F.Supp. 271, 277, *rev'd*, 5 Cir., 354 F.2d 859, *cert. denied* 385 U.S. 815; *but cf. Kansas City Power & Light Co.* v. *McKay*, D.C.Cir., 1955, 225 F.2d 924, *cert. denied* 350 U.S. 884. Plaintiffs do not suggest that the Comptroller has sanctioned, or that the bank has undertaken, any unfair, conspiratorial, or criminal methods of competition, or that there has been any violation of the antitrust laws. The second exception is where it is claimed that some "legal right" has been injured, by which is meant, in its nonconclusory sense, that plaintiff has an independent property right, or a right to be free from the particular kind of competition he is challenging. Such a right is attached to or arises out of an exclusive franchise, on the one hand, or a restricted license or the like, on the other. *Frost* v. *Corporation Commission*, 1929, 278

U.S. 515; *cf. Whitney National Bank* v. *Bank of New Orleans,* D.C.Cir., 1963, 323 F.2d 290, 299-300, *rev'd on other grounds,* 379 U.S. 411. Plaintiffs fit in no such category.

The final general exception is where the plaintiff can show the existence of a "statutory aid to standing" for a class of persons which includes himself. This statutory aid may take the form of a "judicial review" provision of the particular administrator in question for "parties aggrieved," "adversely affected," or the like. In such a case, *FCC* v. *Sanders Bros. Radio Station,* 1940, 309 U.S. 470, would presumably provide standing for legitimate competitors. *See generally, Jaffe, Judicial Control of Administrative Actions,* 513-31. There is, however, no such provision as to the Comptroller of the Currency. An alternative statutory aid may be found if there is an indication of Congressional intent, explicit or implicit, in the relevant substantive acts to grant protection to the competitive interests of a class of businesses which includes the plaintiff. Thus in *Hardin* v. *Kentucky Utilities Co.,* 1968, 390 U.S. 1, the Supreme Court found that a competing private utility company had standing to challenge the expansion of TVA into new areas in alleged violation of the area limitations of section 15d(a) of the Tennessee Valley Authority Act, 16 U.S.C. § 831n-4 (a). The Court said, "[O]ne of the primary purposes of the area limitations in § 15d of the Act was to protect private utilities from TVA competition. . . . Since respondent is thus in the class which § 15d is designed to protect, it has standing . . . ." 390 U.S. at 6-7.

The only possible statutory aid to the standing of travel agents in national banking legislation exists in 12 U.S.C. § 24(7). This section states that national banks may "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking," and then lists numerous powers explicitly granted. It has long been settled

in suits over private contracts that the enumeration of such powers is an effective and strong prohibition of all activities not enumerated and not incidental to banking. *See First National Bank* v. *National Exchange Bank,* 1875, 92 U.S. 122, 128; *National Bank* v. *Matthews,* 1878, 98 U.S. 621, 625; *Logan County National Bank* v. *Townsend,* 1891, 139 U.S. 67, 73. But even assuming that national banks are prohibited by section 24(7) from entering into the business of procuring travel arrangements, this is not sufficient to provide a statutory aid to standing. The prohibition must be demonstrably intended to protect the competitive interests of other members of the prohibited business. *See* the concurring opinion of Judge Thornberry in *Saxon* v. *Georgia Ass'n. of Independent Ins. Agents,* 1968, 5 Cir., 399 F.2d 1010, 1019; *Association of Data Processing Serv. Organizations* v. *Camp,* D.Minn., 1968, 279 F. Supp. 675, *aff'd,* 8 Cir. 2/6/69, F. 2d . We, too, (see 8th Cir. opinion in *Camp,* n.10), cannot accept the simplistic suggestion by the majority in *Georgia Ass'n,* 399 F.2d at 1016, that as soon as it appears that the competitive activities were unlawfully carried out the plaintiffs have standing.

The plaintiffs have not pointed to, nor have we in our research discovered, any evidence that Congress in delimiting the scope of banking activity in the ultra vires section, quoted *supra,* was concerned, in 1863 and 1864 when the national banks were formed,[2] with competitors in the businesses impliedly prohibited, much less in any particularity with travel agents (if they then existed). Rather, the limitations were for the purpose of insuring the stability, liquidity, and safety of the banks. *See National Bank* v. *Matthews, supra* at 626; Davis, Banking Regulation To-

[2] National Bank Act of 1863, ch. 58, 12 Stat. 665; National Bank Act of 1864, ch. 106, 13 Stat. 99.

day: A Banker's View, 31 Law & Contemp. Problems 639 (1966). *See also* Million, The Debate of the National Bank Act of 1863, 2 J. of Pol. Econ. 252 (1894). No doubt Congress has continuously, from 1864 to the present, been "very careful" (see *infra*) in restricting the activities of banks; and no doubt Congress has been, as we shall see in the second portion of this opinion, specifically concerned with certain potential competitors of the banks. But as Senator Proxmire pointed out while offering an amendment to banking legislation[3] specifically designed to protect particular competitors, the thrust of the close regulation of banks is for purposes of stability: "We are very careful in the regulations of banks. This has principally been done to assure the solvency of the banks by limiting the activities of banks to safe and relatively liquid investments." 108 Cong. Rec. 22031 (1962). (*See also* S.Rep. No. 2105, 87th Cong., 2d Sess. (1962) (Supplemental views of Senators Proxmire, Douglas, and Neuberger) in 2 U.S. Code Cong. & Admin. News, 1962, at 3887. While at some point Congressional concern with a sufficient quantity of specific competitors of banks might indicate a Congressional intent that section 24(7) should now be read as a measure not only to protect investors but also to protect all potential members of prohibited activities, such a point has not been reached. More proof of Congressional solicitude is required before this court or any court should convert an economic struggle into a legal one.

The plaintiffs have suggested, however, that the general rule denying competitors standing is no longer valid, or has undergone substantial change. First, they argue that section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 provides standing for any persons claim-

[3] This legislation will form the basis of our holding in the second half of this opinion.

ing to be "adversely affected in fact." This contention seems derived from the interpretation of section 10(a) urged by Professor Davis in his Administrative Law Treatise, § 22.02, and presumably adopted in *American President Lines* v. *FMB*, D.D.C., 1953, 112 F.Supp. 346.[4] We, however, choose to side with Professor Jaffe[5] and the majority of the courts[6] in holding that the passage of the APA was not intended to alter to such a drastic extent previous law on the question of standing. Moreover, we should add that we have serious reservations whether a test of "adversely affected in fact" would provide a simpler means of deciding the issue of standing. We do not pause for such analysis in the present case, but if, as has been suggested, simplicity and ease of determination is a reason for preferring the new interpretation, we do not find it.[7]

The plaintiffs alternatively urge that *Flast* v. *Cohen*, *supra*, indicates a major shift in the judicial attitude toward the general doctrine of standing; and that while it is not directly in point, this decision indicates that the relevant test for determining standing in this situation is whether the parties are sufficiently adverse to bring into focus the issues raised. *See also* the concurrence of Judge

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[4] *See also Baker, Watts & Co.* v. *Saxon*, D.D.C., 1966, 261 F. Supp. 247.

[5] Jaffe, Judicial Control of Administrative Action 528-30. *See also* Note, Competitors' Standing To Challenge Administrative Action Under the APA, 104 U.Pa.L.Rev. 843 (1956).

[6] *See Saxon* v. *Georgia Ass'n of Independent Ins. Agents*, *supra*, at 1019 n.1; *REA* v. *Northern States Power Co.*, 8 Cir., 1967, 373 F. 2d 686, 692-93 & nn. 9-10, cert. denied 387 U.S. 945; *Kansas City Power & Light Co.* v. *McKay*, *supra*.

[7] Indeed, one of the bases for the rule against competitors' suits might well be the difficulty of determining whether mere increased competition is an injury in fact, particularly where a new and largely undeveloped market is involved. Cf. *World Airways, Inc.* v. *Northeast Airlines, Inc.*, 1 Cir., 1966, 358 F. 2d 691.

Thornberry in *Saxon* v. *Georgia Ass'n of Independent Ins. Agents, supra.* Our first response to plaintiffs' contention is that *Flast* v. *Cohen* was not intended to have any major reshaping effect outside the area of standing determinations under Article III for taxpayer suits challenging the constitutionality of a federal taxing and spending statute. Such an approach to standing as used in *Flast*—one focusing solely upon an assessment of the degree of adversity and clarity of the particular case—if applied to questions of administrative law standing would disturb the entire judicial relationship to the administrative as presently understood by Congress. Congress now knows that if it wishes a particular class of plaintiffs to have, or not to have, standing to seek review of agency rulings, it may make, or not make, the types of legislative provisions discussed earlier in this opinion, and that is an end to the matter. Under plaintiffs' proffered approach, the courts would have the last word on standing, based upon their view of the justiciability of the particular circumstances pleaded. When the conflict is one of constitutional dimensions, such an approach may be necessary. In purely administrative matters we think otherwise.

Our second answer is that even if we were to assume that *Flast* v. *Cohen* was intended to affect other areas, we do not read that case to require all administrative standing determinations to be made solely upon an assessment of the degree of adversity and clarity. Rather, *Flast* was concerned with reevaluating the standards for determining adversity and clarity in a situation where the relevant standing doctrine was adjudged to rest entirely upon such considerations. *Flast* is inapplicable when the standing doctrine in question rests upon a basis largely independent of the concerns for adversity and clarity—namely, the limited role of the judiciary in regulating legitimate competition.

In sum, we find no acceptable basis for standing for the travel agents.

DATA PROCESSING

Turning to the second action involving the Comptroller, here plaintiff, Wingate Corporation, which performs certain data processing services for hire, brings suit to enjoin the defendant, Industrial National Bank of Rhode Island, from performing data processing services for the City of Providence, as sanctioned by a general ruling of the Comptroller. While Wingate, like Arnold, complains that the bank is violating section 24(7) of 12 U.S.C. by providing such services to bank customers, its claim to standing is aided by the presence of specific Congressional legislation dealing with banks and computer servicing. In 1962 Congress, after some debate, enacted the Bank Service Corporation Act, 76 Stat. 1132, which allowed small banks to combine to form a separate corporation which could own data processing equipment. The primary purpose of this legislation was to allow small banks to compete more effectively with the larger banks, which had sufficient capital and business to buy their own electric data processing equipment. However, in order to prevent such corporations being used as a subterfuge for entering into the nonbanking business of data processing, and to protect the interests of certified public accounting firms, Congress provided in section 4 of that Act, 12 U.S.C. § 1864, "No bank service corporation may engage in any activity other than the performance of bank services for banks." The legislative history is clear. The prohibition originated in an amendment proposed by the National Society of Public Accountants, which objected to the original version of the bill that would have allowed bank service corporations to solicit outside business to some extent. The Accountants feared injury to their growing business of bookkeeping with the aid of computers. The final pro-

vision was an obvious response. *See* 108 Cong. Rec. 16499, 22031 (1962); Hearings on Misc. Bank Bills Before the Comm. on Banking & Currency of the United States Senate, 87th Cong., 2d Sess., at 79-80 (1962).

We conclude that the present plaintiff is within the class of persons intended to be protected by section 4 of the 1962 legislation, and the only question is whether standing exists to complain not of competition from bank service corporations, but from national banks directly. We conclude in the affirmative. When Congress so explicitly provides protection for a particular business against competition from a regulated national entity—even though indirectly by regulating a subsidiary—standing exists at least to entertain complaints by that business concerning its competitive relationship to the national entity. Section 4 had a broader purpose than regulating only the service corporations. It was also a response to the fears, expressed by a few senators, that without such a prohibition, the bill would have enabled "banks to engage in a nonbanking activity," S.Rep. No. 2105, *supra* (Supplemental views of Senators Proxmire, Douglas, and Neuberger), and thus constitute "a serious exception to the accepted public policy which strictly limits banks to banking." (Supplemental views of Senators Muskie and Clark). We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against.[8]

Indeed, there is a plausible argument that the Bank Service Corporation Act, read in conjunction with 12 U.S.C. § 24(7), does in fact impliedly prohibit national banks from directly entering into the data processing service

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[8] *But cf. Association of Data Processing Serv. Organizations* v. *Camp*, 8 Cir., 1969, F. 2d , n.12, which stated that the reliance of similar plaintiffs upon the Act for standing was "misplaced."

business. If the section four prohibition could be avoided by a small national bank, member of a group owning a service corporation, soliciting its own data processing customers to be serviced by the subsidiary via the bank, the prohibition would be largely illusory. And if a small bank could not directly solicit such customers, it would follow that the large banks, owning their own equipment, could not, or the equalizing effect of the Bank Service Corporation Act would be lost. To be considered in opposition to such an argument is the Comptroller's ruling interpreting the section,[9] and the phenomenon of the one-bank holding company, that is not covered by the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-49, which requires only multi-bank holding companies to divest themselves of all nonbanking interests. We leave the resolution of this conflict to future determination. For the purposes of the issue of standing, we need decide only that the passage of the Bank Service Corporation Act arguably prohibits direct entry by national banks into the data processing service business.

In case No. 7192 the judgment of the District Court is affirmed.

In Case No. 7186 the judgment of the District Court is vacated and the case remanded for further proceedings not inconsistent herewith.

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[9] Comptroller's Ruling ¶7399 provides in part that:

"... such corporations may only perform bank services for banks. Bank services, however, as defined in the Act, would include any service which a bank would ordinarily perform for a customer. Accordingly, if a bank undertakes to handle the payroll accounts or the accounts receivable of a customer, a bank service corporation may perform for the bank the service necessary to enable the bank to fulfill its undertaking."

Appendix "E."

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7192.

ARNOLD TOURS, INC., ET AL.,
PLAINTIFFS, APPELLANTS,
v.
WILLIAM B. CAMP, COMPTROLLER
OF THE CURRENCY, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
ON REMAND FROM THE SUPREME COURT.

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Richard W. Murphy, with whom *Timothy J. Murphy* was on brief, for appellants.

Alan S. Rosenthal, Attorney, Department of Justice, with whom *William D. Ruckelshaus*, Assistant Attorney General, and *Herbert F. Travers, Jr.*, United States Attorney, were on brief, for William B. Camp, Comptroller of the Currency, appellee.

Elliott V. Grabill, with whom *Arthur H. Bloomberg*, and *Grabill & Ley* were on brief, for South Shore National Bank, appellee.

June 1, 1970.

ALDRICH, *Chief Judge*. In *Arnold Tours, Inc.* v. *Camp*, 1 Cir., 1969, 408 F.2d 1147, in a joint opinion covering two actions against the Comptroller of the Currency and two national banks, this court, departing from another circuit

that considered cases such as *Tennessee Electric Power Co. v. TVA*, 1939, 306 U.S. 118, determinative of the question, held that in one of these actions (*Wingate*), the plaintiff had standing to sue. Thereafter, in *Association of Data Processing Service Organizations, Inc. v. Camp*, 1970, 397 U.S. 150, hereinafter *Data Processing*, the Supreme Court, approving the *Wingate* result, but voicing less than total approval of our reasoning, reversed the other decision. It denied certiorari in ours. 3/23/70, U.S.

In our other case (*Arnold Tours*) decided by that same opinion, we held that the plaintiffs lacked standing. The Court vacated our decision in *Arnold Tours*, and returned the case for our further consideration in the light of its decision in *Data Processing*, 3/23/70, U.S. . Following further briefs and oral argument we now respond.

Although the Court's opinion in *Data Processing* ran to several pages, part of it was devoted to disposing of the defendants' contention that Congress had provided against judicial review, a matter not here involved.[1] We believe the Court's entire pronouncement on the issue of standing is contained in the following.

> "The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153

With respect to certain language in the *Wingate* portion of our opinion, the Court said,

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[1] In their brief plaintiffs either misunderstand this fact, or attempt to apply the Court's language addressed to the issue of reviewability to the issue of standing, to which it is not applicable. We have never questioned reviewability.

> "'We do not put the issue in those words, for they implicate the merits. We do think, however, that § 4[2] arguably brings a competitor within the zone of interests protected by it." 397 U.S. at 156

Plaintiffs assert that the Court's standard is different from the one we previously applied. This may be so in some slight degree. At one point we used the word "demonstrably" rather than "arguably."[3] Elsewhere we said that unless section 4 "arguably prohibits direct entry by national banks into the data processing service business," plaintiff could have no standing. By this we meant that unless it could be argued that banks themselves fall within the penumbra of the statute directed against bank service corporations, the statute afforded plaintiff no shelter. Perhaps the "arguably" in this passage is more directed to the merits than the "arguably" in the Court's "zone of interest" formula. The question is academic so far as *Arnold Tours* is concerned. Under any standard, plaintiffs have no standing. They have produced no scintilla of evidence tending to show that Congress was specifically concerned with the competitive interests of travel agencies; nor have they shown enough evidence of concern for general business competitors to create a "zone" within which they are arguably included.

Plaintiffs contend that if section 4 of the Bank Service Corporation Act gives data processing companies standing it must do so for them as well, because it forbids bank serv-

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[2] Section 4 of the Bank Service Corporation Act of 1962, 76 Stat. 1132, 12 U.S.C. § 1864, which provides: "No bank service corporation may engage in any activity other than the performance of bank services for banks."

[3] "The prohibition must be demonstrably intended to protest the competitive interests of other members of he prohibited business." 08 F. 2d at 1150.

ice corporations from engaging in "any" activity beyond rendering services for banks. This is a misconception. The decision in *Data Processing* was not based on the wording of the statute, but on a showing that Congress, in connection with authorizing entities to engage in data processing for banks, had protection of data processing competitors specifically in mind. Plaintiffs have demonstrated nothing else.[4] Clearly the Court did not feel that the mere fact that they were in competition with the defendant bank gave them standing. Had it intended so substantial a change in the law it would not only have written a quite different opinion in *Data Processing*; it would have reversed us out of hand.

The order of the District Court dismissing the complaint for lack of standing is affirmed.

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[4] In our previous opinion we observed that plaintiffs might establish standing if they could evidence "more proof of Congressional solicitude." Their only response has been to show that Congress has presently before it legislation aimed at preventing national banks from rendering travel services. We do not see how the fact that Congress is considering the question is of assistance to plaintiffs. As a practical matter it might suggest an additional reason for our ruling against the plaintiffs. Then, if we have misunderstood the intent of Congress, it may correct us.

Appendix "F."

SUPREME COURT OF THE UNITED STATES
October Term, 1969
ARNOLD TOURS, INC., ET AL v. CAMP ET AL
ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 128. December March 23, 1970

Per Curiam.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the First Circuit is vacated. The case is remanded to that court for further consideration in light of *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, and *Barlow* v. *Collins*, 397 U. S. 159.